INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	5
Conclusion	10

CITATIONS

Cases:	
Lopez v. *United States*, 373 U.S. 427	6
Masciale v. *United States*, 356 U.S. 386	6
Vinyard v. *United States*, 335 F. 2d 176	6
Statutes:	
26 U.S.C. 4704(a)	2
26 U.S.C. 4705 (a)	2

759-507—64

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 737

CHARLES E. CRAIG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 9–14; R. IV, 1–6) [1] is reported at 337 F. 2d 28.

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1964 (Pet. 15; R. IV, 7), and a petition for a rehearing was denied on November 5, 1964 (Pet. 16; R. IV, 8–10). The petition for a writ of certiorari was filed on December 4, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The record is in four volumes, which are referred to by their Roman numerals.

QUESTIONS PRESENTED

1. Whether the defense of entrapment was established as a matter of law.

2. Whether the district court's admission of certain evidence or a statement in the prosecutor's closing argument constituted prejudicial error.

3. Whether the court erred in refusing to give an instruction with respect to the criminal liability of a person who holds narcotics on behalf of another.

STATEMENT

Petitioner was charged under a two-count indictment in the United States District Court for the Eastern District of Arkansas with an unlawful narcotics sale on January 5, 1963, without an appropriate tax stamp and not in pursuance of a written order form, in violation of 26 U.S.C. 4704(a) and 4705(a) (R. I, 1–2). The jury found him guilty on both counts (R. I, 18), and the court imposed concurrent sentences of imprisonment for two years on count 1 and five years on count 2 (R. I, 19). On appeal (R. I, 20–21), the conviction was affirmed (Pet. 15; R. IV, 7).

The evidence at the trial may be summarized as follows:

Burris, a government informer (R. III, 85–86), testified that on January 4, 1963, he was introduced to petitioner by one Clift, in Hot Springs, Arkansas (R. II, 30). Petitioner said that he was interested in narcotics, and that he understood from Clift that Burris knew a party who could supply him. With money furnished by petitioner, Burris telephoned Moore, who then spoke on the telephone to petitioner (R. II, 32–33).

Later petitioner, Moore, and Burris went to Mississippi in petitioner's car (R. II, 33–34). Petitioner gave Moore $500 for the purchase of narcotics (R. II, 35, 47). On January 4 and 5, Moore obtained prescriptions from several doctors and purchased narcotics, most of which were dilaudide tablets, at various pharmacies (R. II, 36–37, 38–41, 70–73). Burris observed petitioner taking hypodermic shots in his hotel room and on the trip back to Little Rock (R. II, 38, 41).

On January 5, 1963, agent Snokhous instructed Burris to place a telephone call to petitioner to order narcotics (R. III, 80). At about 10:00 p.m., Burris telephoned petitioner at his home in Little Rock, and asked if he could supply a burglar friend named Gaines with 20 or 30 dilaudide tablets. Petitioner said that it was not good business to speak over the telephone (R. II, 13–14).

Burris and agent Snokhous drove in agent Dino's car to petitioner's home, where Dino observed the transaction from his car (R. II, 14, 15, 62–63; R. III, 81). When petitioner answered Burris' knock and came outside, Burris introduced agent Snokhous under the name of Jimmie Gaines as a "solid" person in the "underworld racket." Petitioner cautioned Burris about speaking over the telephone (R. II, 15–16; R. III, 82). When Snokhous asked if it was "cool" (safe) to deal out there, petitioner said that it was "all right." Petitioner placed a plastic bottle of tablets in Burris' shirt pocket (R. II, 16, 17; R. III, 82). When Burris asked the price, petitioner said that they could straighten it out the next day, but Snokhous

said that he preferred an immediate settlement since he was leaving that night (R. II, 17–18; R. III 82–83). After petitioner set $20 as a good price, Snokhous paid him with four five-dollar bills, the numbers of which had previously been recorded (R. II, 18; R. III, 83). When Snokhous said that he would buy more narcotics from petitioner on his next trip to the Little Rock area, petitioner answered, "That's all right, but don't call me on the telephone" (R. III, 84). Chemical analysis showed that the 10 tablets contained dilaudide hydrochloride (R. II, 59; R. III, 84). At the time of the sale there were no federal narcotics stamps on the package and no order form (R. III, 85).

In testifying on his own behalf petitioner said that he occasionally used narcotics but that he was not an addict (R. III, 94). On January 3, 1963, when Burris asked petitioner if he wanted to buy some narcotics, he replied that he did not want any bootleg stuff, but that he could use prescription stuff (R. III, 93–94). Petitioner testified that Burris promised that, if petitioner would lend him money to buy narcotics, Burris would introduce him to some doctors so that petitioner could obtain his own prescriptions (R. III, 94). Upon their return from the Mississippi trip petitioner complained that he had not been introduced to any doctors (R. III, 100), and said "Well, let me hold that stuff that you got there for security. I ain't got no money, no medicine, no nothing. I better have something." Burris then agreed to let petitioner hold the dilaudide. Petitioner said that he kept the bottle containing 70 dilaudide tablets as

security for the loan he had made to Burris, who promised to introduce him to some doctors the following day (R. III, 100–101). Petitioner admitted giving 10 of the tablets to Burris on January 5, 1963, on the promise that Burris would replace them the next day. Petitioner testified that he refused the offer of Snokhous to pay $20 for the tablets (R. III, 102–103).

In rebuttal, Burris denied that he had permitted petitioner to keep 70 dilaudide tables as security for his promise to introduce petitioner to some doctors (R. III, 131).

ARGUMENT

1. After the direct examination of petitioner, the prosecutor in chambers asked whether petitioner intended to offer entrapment as a defense (R. III, 105–106). The court stated that "there is evidence in this record right now from which [petitioner] could request an instruction on entrapment," but declined to interfere with the decision of petitioner's counsel to remain silent on whether he would rely on entrapment (R. III, 107). Later, when the court was considering proposed instructions, petitioner's counsel asked for the "stock instruction on entrapment," and the court announced that this request would be granted (R. III, 133). Counsel for both sides stated that they had no objection to the court's usual entrapment instruction (R. III, 138), and it was included in the court's final charge (R. III, 145–147). There was thus no contention at the trial that the evidence showed entrapment as a matter of law.

Nor does the evidence support any such contention. The government agents merely afforded petitioner an opportunity to make the sale, an act which he did willingly and voluntarily. See *Lopez* v. *United States,* 373 U.S. 427. Testimony shows that, at the time Burris was originally introduced to petitioner, petitioner was interested in narcotics. As to the sale charged in the indictment, Burris, an informer, telephoned petitioner and asked petitioner if he would supply him dilaudide tables. In reply, petitioner stated that he could supply the tablets. When Burris and agent Snokhous arrived at petitioner's home shortly thereafter, petitioner immediately made the sale without persuasion. The whole transaction took only five minutes (R. II, 63). On this record, the court did not err in submitting the question of entrapment to the jury. See *Masciale* v. *United States,* 356 U.S. 386; *Vinyard* v. *United States,* 335 F. 2d 176, 183 (C.A. 8).

2. The claims of error at the trial—which are not specified in the petition for a writ of certiorari but are apparently those relied upon below—are without substance.

a. On redirect examination, Burris testified that before he first met petitioner, Clift had already told him that petitioner was in the market for some narcotics. Petitioner's counsel asked for a mistrial on the ground that this was hearsay and requested a proper instruction. This colloquy then ensued (R. II, 31–32):

> The COURT. I will the best I can, and if I am incomplete in it call it to my attention.

> The statement just made by the witness that he had previously been informed by some party to what effect that he was on the lookout for some narcotics is improper because it is hearsay. It should not be considered by this jury for any reason or any purpose whatsoever, and the remark is stricken from the record.
>
> Mr. HOLT [petitioner's counsel]. At this time, for the sake of the record, I would like to make a motion for a mistrial.
>
> The COURT. Overruled.

The court's instruction to disregard this testimony was adequate to prevent prejudice to petitioner without granting a mistrial. The evidence added little, if anything, to petitioner's own testimony indicating that he had been in the market for narcotics.

b. Burris testified on redirect examination that, while the parties were returning from Mississippi to Little Rock, he saw petitioner take two hypodermic shots. When he started to describe them, this colloquy occurred (R. II, 41–42):

> Mr. HOLT. If the Court please, he is not being charged for taking a shot.
>
> The COURT. No, I know he is not.
>
> Mr. HOLT. This is for the purpose of aggravation, if anything.
>
> Mr. DAVIS [government attorney]. Your Honor, the defense counsel opened the inquiry——
>
> The COURT. Well, he said he took two shots. How he took them I think is immaterial. The jury understands I am sure. If not, I'll tell them. He is not charged with taking dope. He is charged with selling dope.

> Mr. DAVIS. The Government would request an instruction on that.
>
> The COURT. All right.

On recross-examination by petitioner's counsel, Burris testified that he heard Moore say to petitioner, regarding a narcotics shot, "Why shoot in the muscle? The vein is a better flash" (R. II, 52). This testimony, which was consistent with petitioner's own subsequent testimony that he was a user of narcotics, was relevant to the issue of entrapment. The trial judge placed the evidence in proper perspective by making clear that petitioner was not being tried for taking the shots. Moreover, government counsel asked for an instruction limiting use of evidence concerning other offenses, but petitioner objected and no instruction was given. Therefore, petitioner can hardly complain about the possible prejudicial effect of this evidence.

c. After the closing arguments the following colloquy occurred out of the hearing of the jury (R. III, 138–139):

> Mr. HOLT [petitioner's counsel]. I would like to make a Motion for a Mistrial at this time on the statement of counsel in his argument that "we have not charged him with the crime of buying in Mississippi" or words to that effect. I don't remember the exact phrasing applied to the commission of the crime in Mississippi.
>
> The COURT. Well, the record would show that this Motion was made after the completion of the arguments. It will be denied.

Since the evidence as to the trip to Mississippi was in the case as part of the background of the sale

charged, there was nothing improper in the prosecutor's statement making clear that this was not the crime charged.

3. Petitioner assigns error in the court's refusal to give an instruction he had requested. The proposed instruction was that, if petitioner "had drugs in his possession * * * only because he was keeping them for another person, and that subsequently he returned the drugs, or a portion thereof, to the person for whom he was keeping the drugs," there was no offense under either of the two counts in the indictment (R. III, 137–138). Both counts of the indictment charged an unlawful narcotics sale to Snokhous for $20 (R. I, 2), and the court's instructions clearly stated that a finding of guilty under either count required the jury to find such sale (R. III, 142, 144). As the court below observed (see Pet. 13), even if Burris or Moore had some title or interest in the narcotics in petitioner's possession and petitioner was holding the narcotics for one of them, this was not a defense if petitioner actually did sell the narcotics to Snokhous.

In short, the instruction asked by petitioner would have required the jury to make an irrelevent finding. The trial court therefore properly refused to give it.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, Jr.,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

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